

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

WASHINGTON DEVELOPMENT	)	
COMPANY, INC., a Montana	)	
corporation,	)	
	)	
Plaintiff,	)	Civil No. 06-676-JE
	)	
v.	)	OPINION AND ORDER
	)	
M/V PAC RIM EXPRESS, her	)	
engines, tackle and equipment,	)	
and TUG MASTER, INC., a	)	
Washington corporation,	)	
	)	
Defendants.	)	
	)	

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JELDERKS, Magistrate Judge:

Plaintiff Washington Development Company, Inc. (WDC) brings this admiralty action against defendant M/V Pac Rim Express (Pac Rim) to recover lease and custodial expenses allegedly provided as "necessaries" to that vessel. Defendant Pac Rim moves for summary judgment. For the reasons set out below, that motion is granted.

#### **FACTUAL BACKGROUND**

Plaintiff WDC, a Montana corporation, owns and operates a marine terminal at Tongue Point on the Columbia River.

Pacific Coast Barge Builders, Inc. (Barge Builders) was formed on January 31, 2005, to construct, refit, and repair barges.

Tug Master, a former defendant not named in plaintiff's operative second amended complaint, purchased defendant Pac Rim in the fall of 2004 with the intention of converting it from an oil tank barge to a deck cargo barge. In February 2005, Tug Master and Barge Builders agreed that Barge Builders would do the conversion work on the Pac Rim in space at the

Tongue Point marine terminal that Barge Builders leased from plaintiff WDC.

Beginning on February 10, 2005, plaintiff WDC leased portions of the Tongue Point marine terminal to Barge Builders. Dennis Thompson, the president of Barge Builders, was the only representative of Barge Builders involved in the lease negotiations. Jennifer Poulsen, facility manager of WDC's Tongue Point marine terminal, was the only representative of WDC involved in those negotiations. Thompson asserts that he informed Poulsen that Tug Master owned defendant Pac Rim. Poulsen disputes this assertion, and asserts that Thompson represented that Barge Builders owned the Pac Rim.

Tug Master delivered the Pac Rim to Barge Builders at the Tongue Point marine terminal, and Barge Builders began working on the barge there on February 10, 2005. Poulsen presented Thompson a written lease agreement after Barge Builders had begun working on the Pacific Rim. Thompson signed the lease agreement as Barge Builders' president. The Pac Rim remained at the Tongue Point marine terminal until May 12, 2006, when the barge was arrested by the United States Marshal pursuant to process issued in this action.

Tug Master did not have any contractual relationship with plaintiff WDC, and did not enter into any lease agreement under which plaintiff agreed to provide services to the Pac

Rim. Tug Master did not enter into any written or verbal agreement with plaintiff WDC.

From October through December, 2005, Tug Master directly paid plaintiff WDC moorage fees for the Pac Rim in the amount of \$3,325 per month and rental fees in the amount of \$200 per month for a fire meter and fire monitor. According to the declaration of Fred Dahl, Jr., Tug Master's president, Tug Master made these payments, for which Barge Builders was obligated, "in order to ensure uninterrupted completion of the barge's conversion." Dahl adds that, after Tug Master made these payments, plaintiff WDC began invoicing Tug Master directly for amounts that Barge Builders owed pursuant to the lease.

Barge Builders worked on the Pac Rim as an independent contractor. Barge Builders and Tug Master had no financial interest in each other, and had no control over each other. Tug Master did not authorize Barge Builder to procure goods or services for the Pac Rim's account, and did not authorize Barge Builders to incur liens on the Pac Rim.

#### **PLAINTIFF'S CLAIM**

Plaintiff alleges that Barge Builders "represented itself as the owner of the BARGE PAC RIM EXPRESS and entered into a lease with plaintiff for the purpose of repairing and renovating the barge." Plaintiff further alleges that it provided moorage, warehouse, office, and outside storage space

to the Pac Rim, "all for the purpose of supporting the repair and renovation of the vessel," pursuant to Barge Builders' representation that it owned the Pac Rim.

Plaintiff alleges that the moorage and other space it provided for the Pac Rim "constitute necessities within the meaning of the Maritime Lien Act, 46 U.S.C. § 31342." It adds that the reasonable value of "the necessities" it provided is \$34,665. Plaintiff also alleges that it is entitled to recover \$100 per day in "custodian fees" for a total of 41 days that the Pac Rim was in its custody after the vessel was arrested by the U.S. Marshal.

#### **STANDARDS FOR EVALUATING MOTIONS FOR SUMMARY JUDGMENT**

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The moving party may discharge this burden by showing that there is an absence of evidence to support the nonmoving party's case. Id. When the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and show that there is a genuine issue for trial. Id. at 324.

The substantive law governing a claim or defense determines whether a fact is material. T.W. Elec. Serv., Inc.

v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Reasonable doubts concerning the existence of a factual issue should be resolved against the moving party. Id. at 630-31. The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in the nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1985). No genuine issue for trial exists, however, where the record as a whole could not lead the trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

#### DISCUSSION

Plaintiff here attempts to enforce a maritime lien on defendant Pac Rim pursuant to 42 U.S.C. § 31342, to recover moorage fees and rents that accrued while the barge was located at plaintiff's facility. That section states that a person who provides "necessaries" to a vessel "on the order of the owner or a person authorized by the owner" has a lien on the vessel.

Plaintiff contends that the moorage and other space that it provided are "necessaries" within the meaning of § 31342, and that the Pac Rim is liable for these costs because Barge Builders represented that it was the owner of the Pac Rim.

Under § 31341(a), the following persons are "presumed to have authority to procure necessities for a vessel:

- (1) the owner;

(2) the master;

(3) a person entrusted with the management of the vessel at the port of supply; or

(4) an officer or agent appointed by --

(A) the owner;

(B) a charterer;

(C) an owner pro hac vice; or

(D) an agreed buyer in possession of the vessel."

Defendant contends that it is entitled to summary judgment because plaintiff cannot establish that Barge Builders qualifies as a "person" presumed to have authority to procure necessities for the Pac Rim. I agree. Barge Builders was not the owner or master of the Pac Rim, but instead only agreed to perform specified work on the vessel as an independent contractor. Though Tug Master hired Barge Builders to convert the Pac Rim to a cargo barge, there is no evidence in the record before the court that Tug Master "entrusted" Barge Builders with the "management of the vessel at the port of supply." Though Barge Builders agreed to perform certain work on the Pac Rim, there is no evidence that Tug Master appointed Barge Builders to act as its "agent" within the meaning of § 31341.

The record before the court will not support the conclusion that Barge Builders had the authority required to procure necessities for which the Pac Rim could become liable through imposition of a maritime lien. In Farwest Steel Corp. v. Barge Sea-Span, 828 F.2d 522 (9<sup>th</sup> Cir. 1987), the Ninth

Circuit Court of Appeals considered whether a subcontractor could enforce a maritime lien when it had not been paid for supplies furnished to the general contractor. The Farwest court noted that courts have "uniformly held that the general repair contractor was not endowed with sufficient 'management' authority to support a [statutory maritime] lien" in favor of a subcontractor. Id. at 526. The court added that the only exception to this "rule against the subcontractor lien will occur where the subcontractor has been engaged by a general contractor in circumstances where the general contractor was acting as an agent at the direction of the owner to engage specific subcontractors for repairs." Id. In the absence of evidence that it acted as anything other than an independent contractor, or that the owner of the vessel intended that it be engaged to provide services, a subcontractor cannot establish a right to enforce a maritime lien. See id.

In the present action, there is no evidence in the record that, when it leased facilities from plaintiff WDC, Barge Builders was acting as an agent at Tug Master's direction to obtain services specifically from WDC. However, even if Tug Master had known that Barge Builders was likely, or even almost certain to arrange to carry out the conversion at plaintiff's facility, that knowledge would not constitute Tug Master's direction or requirement that the general contractor use plaintiff's services. In Port of Portland v. The M/V PARALLA, 892 F.2d 825 (9<sup>th</sup> Cir. 1989), a barge owner



met with a prospective general contractor and representatives of the Port of Portland to discuss a number of issues, including the Port's use fee. The barge owner later selected the general contractor to work on its barge, and the general contractor contracted with the Port for use of its facilities. After the general contractor failed to pay the Port all it was owed on the project, the Port arrested the barge and attempted to assert a maritime lien for necessities. Id. at 827. The Court of Appeals concluded that the Port could not enforce a lien against the barge because it could not establish that the general contractor was the owner's agent in contracting with the Port, or that the barge owner required the general contractor to use the services of the Port as a subcontractor. Id. at 828. The court concluded that, though the Port might be able to show that it "was likely, even perhaps rather certain," that the general contractor would choose to use the Port's facilities, that did not "constitute a direction or requirement to use those services." Id.

Plaintiff contends that defendant's motion for summary judgment should be denied because evidence in the record supports the conclusion that Barge Builders represented that it owned the Pac Rim. I disagree. There is a factual disagreement as to what representations Barge Builders made about the ownership of the Pac Rim. Poulsen, WDC's facility manager, has submitted a declaration stating that Thompson represented that Barge Builders owned the barge, and Thompson

has submitted a declaration stating that he told Poulsen that Tug Master owned the barge. However, this is not a material issue of fact, because there is no evidence that Tug Master, Pac Rim's owner, made, participated in, confirmed, or even knew or should have known of any misrepresentation to plaintiff about the ownership of the vessel. Fully accepting Poulsen's representation that Barge Builders asserted that it owned the vessel does not alter the uncontroverted fact that it did not.

Plaintiff has cited, and I have found, no reported decisions stating or implying that a misrepresentation made by one who lacks the authority to obtain necessities for a vessel under § 31342 and who is not presumed to have such authority under § 31341 will support the imposition of a maritime lien. To the contrary, in Port of Portland, the Court of Appeals noted that the implied authority required to support imposition of a maritime lien has usually been found where representations were made by persons whose authority is presumed under relevant statutory provisions or where a vessel's owner or its representative has seriously misled the subcontractors. Id. at 829.

The record before the court here supports only the conclusion that Barge Builders acted as an independent contractor when it leased facilities from plaintiff to be used in the conversion of the Pac Rim. There is no evidence that Barge Builders acted as Tug Master's agent or as Tug Master's


direction when it leased facilities from plaintiff. To the contrary, the record supports only the conclusion that Barge Builders acted as an independent contractor in selecting plaintiff's facility. The only evidence directly addressing Barge Builder's selection of plaintiff's facility is Thompson's declaration that Tug Master never directed him "to Washington Development or the Tongue Point terminal and never suggested that Pacific Coast Barge Builders should lease the Tongue Point terminal or any other particular terminal for the conversion of PAC RIM EXPRESS."

Under these circumstances, plaintiff cannot establish that it is entitled to enforce a maritime lien against the Pac Rim. Accordingly, defendant is entitled to summary judgment.

#### CONCLUSION

Defendant's second motion for summary judgment (#50) is GRANTED.

DATED this 13<sup>th</sup> day June, 2007.

  
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John Felderks  
U.S. Magistrate Judge